No. 07-____

IN THE

Supreme Court of the United States

ALAM SHER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a government employee, who has not been granted immunity or otherwise received notice that his answers in an administrative investigation may not be used to incriminate him, may be disciplined for the good-faith invocation of his Fifth Amendment privilege against self-incrimination.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are contained in the caption of the case.

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INTRODUCTION

The decision below merits this Court's review because it heightens a well-developed split in the lower courts on an important and recurring Fifth Amendment issue that affects public employees and employers nationwide, and because it is inconsistent with several decisions of this Court.

This Court has long held that a witness may invoke the Fifth Amendment privilege against self-incrimination whenever he "reasonably believes" that his answers may tend to incriminate him, *Kastigar v. United States*, 406 U.S. 441, 445 (1972), and that the government may not penalize the witness for such an invocation of the privilege, *e.g., Minnesota v. Murphy*, 465 U.S. 420, 429 (1984). The lower courts are deeply divided over how these Fifth Amendment principles are affected by *Garrity v. New Jersey*, 385 U.S. 493 (1967), which held that statements compelled from a public employee by the threat of employment sanctions could not be used to prosecute the employee criminally. In particular, the lower courts are split over the following recurring question: Whether a public employee who invokes the privilege in an administrative investigation—and who has not been informed that his answers may not be used against him in a criminal prosecution—may be disciplined on the ground that *Garrity* "automatically" immunizes his statements and thereby makes invocation of the privilege improper.

In this case, the First Circuit joined the Fifth and Eighth Circuits and the high courts of several States in concluding that such an employee's lack of notice of his *Garrity* immunity is not a bar to penalizing him for invoking his Fifth Amendment rights. On the

other hand, the Second, Sixth, Seventh, D.C., and Federal Circuits, along with the majority of State courts to address the issue, have adopted the view that, absent notice of his entitlement to such immunity, a government employee may *not* be penalized for invoking the privilege.

In addition to exacerbating this deep division in the lower courts, the decision below merits this Court's attention because it is inconsistent with this Court's own decisions. In particular, the decision conflicts with this Court's holding, in *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), that—in the absence of assurance of immunity *at the time of the testimony*—a witness cannot be deprived of his right to claim the privilege by the mere "predictive judgment" that he will be legally entitled to claim such immunity in a future criminal prosecution. *Id.* at 261. In addition, in holding that petitioner's invocation of the privilege was improper because petitioner's good-faith belief that he was at risk of incrimination was erroneous in light of *Garrity*, the decision conflicts with *Kastigar* and numerous other cases holding that the propriety of invoking the privilege turns on whether a witness *reasonably believes* that he is at risk of incrimination—*not* on whether the belief ultimately turns out to be erroneous.

Furthermore, the question presented is an important Fifth Amendment issue as to which clear guidelines for public employers and employees, and a uniform constitutional rule, are particularly important.

Accordingly, petitioner submits that this Court's review is warranted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 488 F.3d 489 (1st Cir. 2007). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* is unreported.

JURISDICTION

The court of appeals issued an order denying Petitioner's timely filed petition for rehearing and rehearing *en banc* on August 3, 2007. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

STATEMENT OF FACTS

Petitioner Alam Sher was Chief of Pharmacy at a Department of Veterans Affairs ("VA") hospital in Gardiner, Maine. On January 29, 2001, the VA initiated an investigation of Mr. Sher's practice of obtaining free Lipitor samples from pharmaceutical companies for personal use, also known as "sampling." VA criminal investigator Timothy Bond referred the matter to the U.S. Attorney's office "for consideration for criminal prosecution." The office verbally declined prosecution on March 7, 2001. Pet. App. 4a-5a.

The VA Chief of Staff subsequently sent a letter to Mr. Sher notifying him that an interview had been scheduled for July 2001, and that "federal regulations require employees to furnish information ... in cases

respecting employment and disciplinary matters, and that refusal ... may be grounds for disciplinary action." *Id.* at 6a (internal quotation marks and alterations omitted). The letter did not, however, indicate that any information provided by Mr. Sher would be protected in any way from use in any subsequent criminal proceedings.

After the VA refused to postpone the interview by two days to permit Mr. Sher's retained counsel, Sumner Lipman, to attend, the interview was set by the VA for July 11, 2001. Mr. Sher was represented at the interview by Lipman's partner Keith Varner, an attorney who does not practice criminal law. Bond, the criminal investigator, was one of the VA personnel in attendance. *Id.* at 6a-7a.

At the interview, Varner "expressed his concern that the interview would expose Sher to criminal liability." *Id.* at 7a. Despite this expression of concern, the VA representatives did not indicate that any statements Mr. Sher made would not be used against him in a criminal prosecution. Instead, the VA took the position that Mr. Sher should be satisfied with a letter faxed from the U.S. Attorney's Office, which stated in its entirety:

> On March 7, 2001, this office declined criminal prosecution of Mr. Sher in favor of administrative action. The conduct for which Mr. Sher was being considered for prosecution was his request and receipt of drug samples (specifically Lipitor) in August of 2000 and January and February of 2001.

Id. However, the dates listed in the letter did not cover all of the dates of Mr. Sher's conduct—omitting, in particular, June 2000 and December 2000—and

the letter made no commitment that the declination of prosecution could not be changed based upon additional evidence that would support criminal charges. *See id.* at 4a.

Lipman, reached by phone, expressed his concern that "the letter still left Mr. Sher at risk of criminal prosecution," and Mr. Sher, on the advice of counsel, declined to answer questions. *Id.* at 7a. At some point after the July 11 interview, VA attorney Carol Moore directed Mr. Sher's attorneys to case law in support of her contention that Mr. Sher was obligated to cooperate in the investigation. Mr. Sher's attorney responded in a July 25, 2001 letter that Mr. Sher would attend an interview and cooperate so long as he received "the same [immunity] language offered from the VA as was provided in both the Weston and Hanna cases" cited by Moore. *Id.* at 159a.[1]

The VA did not schedule another interview, and ultimately sustained administrative charges against Mr. Sher for, "[o]n July 11, 2001 ... refus[ing] to provide information to an agent from the [VA] Inspector General's office," and for soliciting and possessing Lipitor. Pet. App. 111a. The VA imposed a forty-five day suspension and demoted Mr. Sher from

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[1] *See Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 946 (Fed. Cir. 1983) (employee expressly informed that "[a]ny information or evidence you furnish ... or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings"); *Hanna v. Dep't of Labor*, 18 Fed. Appx. 787, 790 (Fed. Cir. 2001) (employee provided with "a clear and unambiguous statement that nothing [he] said at the interview could be used against him in a criminal proceeding").

his position with a corresponding reduction in pay grade from GS-13 to GS-12. *Id.* at 8a.

On appeal to the Merit Systems Protection Board ("MSPB"), an ALJ sustained the sampling charges but overruled the failure to cooperate charge on the ground that "the concerns of Mr. Sher and his counsel regarding possible prosecution were legitimate." *Id.* However, the MSPB panel reversed the ALJ's dismissal of the failure to cooperate charge, ruling that the U.S. Attorney's Office letter, by stating that that office had "declined criminal prosecution" in March 2001, provided Mr. Sher with sufficient immunity to make his invocation of his Fifth Amendment rights improper and punishable. *Id.* at 112a.

Mr. Sher petitioned the U.S. District Court for the District of Maine for review of the MSPB decision. A magistrate judge recommended upholding the MSPB panel, reasoning that the administrative nature of the investigation and the declination of prosecution provided sufficient protection to Mr. Sher. *Id.* at 68a-107a. The district court adopted the magistrate judge's recommendation. *Id.* at 50a-67a.

On appeal, the First Circuit declined to rely on the U.S. Attorney's letter as sufficient to provide Mr. Sher with immunity, but nonetheless affirmed. *Id.* at 1a-38a. The court held that Mr. Sher was unjustified in invoking the Fifth Amendment privilege, and could accordingly be disciplined for his silence, because immunity under *Garrity* attached automatically when he was ordered to answer questions on pain of possible employment sanctions. *Id.* at 22a. The First Circuit recognized that several Circuits have held

that a government employer may not discipline an employee for invoking his Fifth Amendment privilege when the employer did not notify the employee that his answers could not be used against him in a criminal prosecution. *Id.* at 24a-25a. However, the court declined to adopt such a rule requiring actual notice. Instead, the court held that, because Mr. Sher was represented by counsel, he could be "charged with" notice of "his immunity [under] *Garrity*"—and could therefore be disciplined for invoking the privilege—even in the absence of evidence that Mr. Sher or his counsel was actually aware that any such immunity was applicable. *Id.* at 29a.

Judge Stahl, dissenting, argued that the majority erred in concluding that a government employee may be disciplined for invoking the Fifth Amendment privilege "even where, as here ... he has an objectively reasonable fear that his statements will not in fact be protected by use immunity." *Id.* at 40a. He cited multiple court of appeals decisions holding that actual notice of use immunity is required, and contended that this rule was a necessary one because absent such notice employees would be "discipline[d] when they believe they are simply exercising a basic constitutional right." *Id.* at 43a. Judge Stahl explained that "[w]hile government employees may understand that they have a Fifth Amendment right to remain silent, they may not understand the complex exceptions to that rule under *Garrity*," *id.*, and he added that under his understanding of the law, even "a represented employee who reasonably believes ... that his statements may indeed be used against him, should not be punished for invoking his constitutional right to remain silent," *id.* at 46a n.26.

On August 3, 2007, the First Circuit denied Mr. Sher's petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS ARE DIVIDED OVER WHETHER A GOVERNMENT EMPLOYEE, WHO HAS NOT RECEIVED NOTICE THAT HIS ANSWERS IN AN ADMINISTRATIVE INVESTIGATION MAY NOT BE USED TO INCRIMINATE HIM, MAY BE DISCIPLINED FOR HIS GOOD-FAITH INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The lower courts are deeply divided over whether a government employee may be penalized for invoking his Fifth Amendment privilege against self-incrimination when he has not received notice that his answers may not be used to incriminate him.

At least five federal courts of appeals—the Second, Sixth, Seventh, District of Columbia, and Federal Circuits—have adopted the view that an employee may not be disciplined for invoking the privilege unless he "is adequately informed ... that his replies (and their fruits) cannot be employed against him in a criminal case." *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973) (invalidating suspension and discharge of Bureau of Customs employee who did not receive such notice). In contrast, the Fifth and Eighth Circuits have joined the First Circuit in holding that an employee's actual notice of his immunity is not required.

On the majority side of the conflict, the Seventh Circuit has consistently held that a government

employee faced with questions about potentially criminal conduct must be notified "that he would be granted immunity from prosecution based on his answers and that a failure to answer would therefore be viewed negatively," *Franklin v. City of Evanston*, 384 F.3d 838, 841 (7th Cir. 2004), and that no "disciplinary action [may] be taken against the witness for his refusal to testify, unless he is first advised that, consistent with the holding in *Garrity*, evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings," *United States v. Devitt*, 499 F.2d 135, 141 (7th Cir. 1974).[2] The rule recognizes that in the absence of notice that they are protected by immunity, many employees would "instinctively 'take the Fifth' and by doing so unknowingly set themselves up to be fired without recourse." *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002).

Similarly, the Federal Circuit has consistently adhered to the holding in *Kalkines*, 473 F.2d at 1393-98, that actual notice of *Garrity* immunity is a prerequisite to disciplining an employee for invoking the privilege. *See, e.g.*, *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir.

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[2] *Accord Driebel v. City of Milwaukee*, 298 F.3d 622, 638 n.8 (7th Cir. 2002) (employer must "*warn* [the employee] that because of the immunity to which [case law] entitles him, he may not refuse to answer the questions on the ground that the answers may incriminate him.") (internal citation omitted; emphasis and second alteration in the original); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 (7th Cir. 1973) (discharge of police officers for invoking Fifth Amendment privilege invalid where the officers "were not advised that their answers would not be used against them in criminal proceedings").

2001) (overturning discharge of employee who was given only a letter conveying a "decision to decline prosecution" but no express notice of immunity); *Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed Cir. 1983) (under *Garrity*, to compel an employee to answer potentially incriminating questions he must be "duly advised of his options to answer under the immunity granted or remain silent and face dismissal").

The Sixth, D.C., and Second Circuits have likewise recognized, contrary to the First Circuit's decision here, that actual notice is required. *See McKinley v. City of Mansfield*, 404 F.3d 418, 439 n.24 (6th Cir. 2005) (under *Garrity*, "a state employer who compels an employee to make incriminating statements must ... promise not to use those statements in a criminal proceeding against the employee"); *Devine v. Goodstein*, 680 F.2d 243, 246 (D.C. Cir. 1982) (employee may only be "discharged for refusing to testify at an administrative hearing" when he "is informed that his responses and their fruits cannot be employed against him in a criminal case") (citing *Kalkines* and Second Circuit decision in *Uniformed Sanitation*); *Uniformed Sanitation Men Ass'n Inc. v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970) (Friendly, J.) (employee may be fired for remaining silent only where he is "duly advised of his options and the consequences of his choice").[3]

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[3] The Eleventh Circuit has also suggested that actual notice of *Garrity* immunity is necessary before an employee may be disciplined for refusal to testify. *See Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir. 1986) (court cannot "require public employees to speculate whether their statements

The majority of State courts to address the issue have also held that actual notice is required. As the Supreme Court of Wisconsin has put it, the Fifth Amendment requires that "the coercive power of job forfeiture should not be employed unless it is made clear that to speak will not result in criminal prosecution." *Oddsen v. Bd. of Fire & Police Comm'rs*, 321 N.W.2d 161, 164 (Wis. 1982); *accord State v. Brockdorf*, 717 N.W.2d 657, 665 (Wis. 2006) (citing *Oddsen* and Seventh Circuit decision in *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973)); *see also Baglioni v. Chief of Police of Salem*, 656 N.E.2d 1223, 1224-26 (Mass. 1995) (officers must be given assurance of effective immunity before they can be required to answer potentially incriminating questions); *Carney v. City of Springfield*, 532 N.E.2d 631, 635 (Mass. 1988) (overturning discharge of police officer for refusal to answer questions based on failure to affirmatively offer immunity to supplant Fifth Amendment privilege); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 945 (Ohio 1990) (upholding discharge on the ground that "[t]he privilege against self-incrimination is preserved because a statement by investigators that nothing said at the hearing can be used at a subsequent criminal proceeding effectively

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will later be excluded under *Garrity*"); *but cf. Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (declining to require city to expressly offer use immunity as part of policy requiring firefighters to take polygraph tests while expressly preserving constitutional rights).

immunizes that testimony from later use by a prosecutor"). Other state high courts have likewise held that actual notice is required.[4]

On the other hand, the Fifth and Eighth Circuits, like the First Circuit, have held that an employee's

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[4] *See Gandy v. State ex rel. Div. of Investigation & Narcotics*, 607 P.2d 581, 583-84 (Nev. 1980) (dismissal of public employee for refusal to take polygraph test permissible only where employee has been informed "that the answers cannot be used against him in any subsequent criminal prosecution, and that the penalty for refusing to answer is dismissal"); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485, 491 (Wash. 1972) (sanctioning the dismissal of police officers only where they have been "advised that information supplied through their answers could not be used against them in later criminal proceedings, and that their refusal to cooperate in the investigation could result in their dismissal"); *see also Gardner v. Mo. State Highway Patrol Superintendent*, 901 S.W.2d 107, 113 (Mo. Ct. App. 1995), *Mot. for Transfer to Sup. Ct. denied* (Jul. 25, 1995) (government employee may be dismissed for refusing to respond to investigatory questions only when he has been "adequately advised" of his *Garrity* immunity); *Banca v. Town of Phillipsburg*, 436 A.2d 944, 948 (N.J. Super. Ct. App. Div. 1981) ("[Police officer] was required to have been clearly, unambiguously and expressly advised of his use immunity at the outset as a prerequisite to the subsequent imposition of a disciplinary sanction for refusal to make a statement."); *Eshelman v. Blubaum*, 560 P.2d 1283, 1285-86 (Ariz. Ct. App. 1977) (police officer must be informed of his *Garrity* immunity before he may be forced to undergo a polygraph test or face dismissal); *In re Waterman*, 910 A.2d 1175, 1178-80 (N.H. 2006) (citing *Eshelman* and relying on the giving of a "*Garrity* Warning" as basis for upholding termination of state trooper for refusal to take polygraph test); *Avant v. Clifford*, 341 A.2d 629, 655-56 (N.J. 1975) (citing *Kalkines* and *Uniformed Sanitation* and holding that in prison disciplinary proceedings prisoner and his counsel "must be advised" of prisoner's entitlement to use immunity).

actual notice of his immunity is not required. The Eighth Circuit, in *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998), held that the discharge of a sheriff's deputy for refusal to answer questions was constitutionally permissible even where the employee was not "told that his answers ... could not be used against him in [a] criminal prosecution." *Id.* at 471. The Court reasoned that "the mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity," and that it is only the latter that the Constitution prohibits. *Id.* Likewise, the Fifth Circuit, in *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), upheld the discharge of public employees who invoked their Fifth Amendment privilege and refused to take a polygraph exam. Rejecting the employees' contention that they should have been informed that their responses would be protected by use immunity, the Fifth Circuit expressly rejected the decisions of other Circuits requiring an "affirmative tender of immunity to an employee." *Id.* at 1074. Rather, the court held, the Constitution requires only that an employer not affirmatively "demand ... the *waiver* of [the] immunity" automatically conferred by *Garrity*. *Id.* at 1074-75 (emphasis added).

Several State high courts have adopted the same view that actual notice of immunity is not a prerequisite to disciplining a public employee for invoking the Fifth Amendment privilege in an administrative investigation. *See, e.g.*, *Debnam v. North Carolina Department of Correction*, 432 S.E.2d 324, 330 (N.C. 1993) (citing *Gulden* and holding "that a government employer is not required to affirmatively inform an employee of the law relating

to use immunity before discharging that employee for refusal to answer questions which may incriminate him"); *Matter of Matt v. Larocca*, 518 N.E.2d 1172, 1176 (N.Y. 1987) (upholding discharge of public employee who invoked Fifth Amendment privilege, on ground that "the State was not obligated to inform petitioner that immunity attached before ordering him to answer questions"); *State Dep't of Corr. Servs. v. Gallagher*, 334 N.W.2d 458, 462 (Neb. 1983) (upholding dismissal of parole officer based on reasoning of *Gulden*); *see also Lybarger v. City of Los Angeles*, 710 P.2d 329 (Cal. 1985) (requiring actual notice of immunity as a state statutory requirement but opining in *dicta* that under federal Constitution police officer could be disciplined for his silence even absent such notice).

In short, the First Circuit's decision upholding the imposition of discipline, in the absence of actual notice to petitioner of his immunity, for petitioner's invocation of the privilege exacerbates a deep division of authority over this important Fifth Amendment issue.

II. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S CASES

This Court should also grant review because the First Circuit's decision is inconsistent with this Court's cases in at least two key ways.

First, the decision below is premised on the view that Mr. Sher (or his counsel) should have recognized (based on the VA's threats of disciplinary action for failure to cooperate) that any statement Mr. Sher made would be protected by *Garrity* immunity in any subsequent criminal prosecution, and that

accordingly Mr. Sher "had no basis under the Fifth Amendment for refusing to answer the VA's questions." Pet. App. 23a. This notion—that a witness loses his Fifth Amendment right to invoke the privilege if it can be predicted that he will be immune in a subsequent criminal prosecution—is squarely contrary to this Court's case law.

In *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1982), this Court held that *even a federal judge's prediction* that the witness would be entitled to immunity in a subsequent prosecution does not deprive the witness of the right to invoke the privilege. In *Pillsbury*, John Conboy was granted use immunity for certain grand jury testimony, and was later asked questions in a civil deposition drawn from the transcript of the immunized testimony. *Id.* at 250-51. Conboy asserted his Fifth Amendment rights, and the district court ordered him to answer—ultimately holding him in contempt for refusing—based on its conclusion that the answers were protected by the grant of immunity and its "predict[ion] that a court in any future criminal prosecution ... will be obligated to protect against evidentiary use of the deposition testimony." *Id.* at 261. This Court held that "such a predictive judgment" about the witness' entitlement to immunity cannot override the witness' right to invoke the privilege. *Id.* Rather, the witness must "receive[] the *certain* protection of his Fifth Amendment privilege," and therefore may not be compelled to testify "over a valid assertion of [the] ...privilege" unless he receives "*assurance* of immunity *at the time*." *Id.* at 261, 263 (emphasis added). The First Circuit's holding in this case that the ability to predict the applicability of *Garrity* immunity is

sufficient to deprive an employee of his right to claim the protection of the Fifth Amendment is flatly inconsistent with *Pillsbury*.

Nor is *Pillsbury* alone in establishing that a witness must be *assured* of his immunity before he loses the right to remain silent in reliance on the privilege. This Court has repeatedly recognized—including in the *Garrity* line of cases—that one who asserts the privilege "'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding." *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (emphasis in original) (quoting *Maness v. Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring in result)); *see also Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) ("[A] witness protected by the privilege may rightfully refuse to answer *unless and until he is protected* at least against the use of his compelled answers . . . .") (emphasis added); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (individual compelled to testify "must be *offered* whatever immunity is required to supplant the privilege") (emphasis added; internal citation omitted).[5]

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[5] Indeed, in *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court held that a police officer could not be discharged for refusing to waive his Fifth Amendment rights, and expressly declined to address whether *Garrity* would have protected him despite the waiver. *See id.* at 278-79 ("We need not speculate whether, if appellant had executed the waiver of immunity . . . the effect of . . . [*Garrity*] would have been to nullify the effect of the waiver."). The Court reasoned that "[p]etitioner could not have assumed—*and was not required to assume*—[that signing

In short, this Court's cases establish that a witness is entitled to invoke his Fifth Amendment privilege unless and until he is assured that his answers cannot be used in a criminal prosecution. The First Circuit's holding that a public employee is deprived of the right to invoke the privilege in the absence of such assurance—so long as threats of disciplinary action would allow a lawyer to conclude that *Garrity* immunity should apply—relies on precisely the type of "predictive judgment" this Court's cases have ruled out as a basis for overriding the privilege.

Second, the First Circuit's holding conflicts with the fundamental principle that "the Fifth Amendment privilege against compulsory self-incrimination 'protects against any disclosures that the witness *reasonably believes* could be used in a criminal prosecution or could lead to other evidence that might be so used.'" *Hiibel v. Sixth Jud. Dist. Court*, 542 U.S. 177, 190 (2004) (emphasis added) (quoting *Kastigar v. United States*, 406 U.S. 441, 445 (1972)). Under this well-established framework, the relevant question before the First Circuit was simply whether Mr. Sher's good-faith belief (based on the advice of counsel) that he risked self-incrimination could be termed *unreasonable* when neither he nor his counsel was given actual notice that his statements were protected. The First Circuit and other courts that have deemed actual notice unnecessary have universally failed to recognize that

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the waiver was] an idle act of no legal effect." *Id.* at 279 (emphasis added).

the issue, under *Kastigar*, is *not* simply whether *Garrity* eliminates the employee's risk of self-incrimination, but rather whether *Garrity* renders the employee's *belief* that he risks self-incrimination unreasonable.

Had the First Circuit properly analyzed the Fifth Amendment issue under the "reasonable belief" framework, it would have been hard-pressed to conclude that Mr. Sher could have *no* reasonable fear of self-incrimination. Both Mr. Sher and his counsel were clearly unaware, at the July 11, 2001 interview, of even the possibility that *Garrity* immunity applied.[6] The VA personnel at the interview also appeared unaware—indeed, the VA letter scheduling the interview appeared to reflect a view that no such immunity was necessary because the VA had deemed the investigation "administrative" rather than "criminal." Furthermore, even if Mr. Sher's attorney had been thoroughly familiar with *Garrity*, the First Circuit would have had to recognize that such an attorney could not have been certain, absent an

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[6] The First Circuit noted that Mr. Sher's attorney was subsequently referred to case law that described *Garrity* immunity. Pet. App. 30a-31a. However, Mr. Sher was disciplined for refusing to answer questions *on July 11*, making any subsequent knowledge of *Garrity* irrelevant. Indeed, the ALJ found that Mr. Sher's attorney made clear, upon being referred to these cases, that Mr. Sher would answer questions so long as the VA offered "the same [immunity] language ... as was provided" in those cases, *see* n.1, *supra*, yet the VA chose not to schedule another interview and instead disciplined Mr. Sher for invoking the privilege on July 11, Pet. App. 159a.

affirmative statement by the VA, that Mr. Sher's statements would be protected.[7]

In short, the First Circuit's holding that an employee may be deprived of his right to invoke the Fifth Amendment privilege in the absence of actual notice that his statements may not be used to incriminate him conflicts with this Court's cases establishing a witness' right to invoke the privilege so long as he "reasonably believes" his answers place him at risk of self-incrimination.

III. THE ISSUE IN CONFLICT IS WELL PRESENTED BY THIS CASE

This case presents the Fifth Amendment notice issue on which the lower courts are divided in the context of a well-developed factual record, and of thoroughly-reasoned majority and dissenting opinions in the First Circuit; and the court below upheld the VA's demotion of petitioner based solely on its resolution of the issue in conflict.

In addition, the fact that petitioner was represented by counsel at the time he invoked the privilege presents the conflict in the lower courts

[7] Among other things, prior First Circuit cases indicated that *Garrity* immunity could be triggered only by an express threat of *dismissal* from employment, *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980), and that where the employer had no rule "*mandating* that claiming [one's] constitutional right to remain silent must necessarily result in [dismissal]," testimony would not be protected by *Garrity*, *United States v. Stein*, 233 F.3d 6, 17 (1st Cir. 2000) (emphasis added). Here, Mr. Sher was told that "[r]efusal to testify ... may be ground for disciplinary action," Pet. App. 22a—not that refusal would *necessarily* result in *dismissal*—and, as a result, a fear that *Garrity* would be held inapplicable would clearly have been reasonable.

more fully than would a case involving an unrepresented employee. The employee's representation by counsel is a common feature in cases addressing this issue,[8] and the presence of that feature in this case will allow this Court to resolve not only the question whether notice of *Garrity* immunity is required, but also whether that obligation may be satisfied, for a represented employee, by something other than actual notice.

To be sure, it is unlikely that this Court will find an employee's representation by counsel calls for a different notice rule—other than the instant case, the cases have almost uniformly treated such representation as irrelevant to the proper determination of the notice issue. But even a determination that the presence of counsel does not affect the notice required will resolve a point that, as noted, is present in this case and a high percentage of the other cases at issue.

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[8] *See, e.g., Kalkines*, 473 F.2d at 1396 (expressly rejecting argument that employee's representation by counsel should affect extent of notice required); *Carney*, 532 N.E.2d at 634 (noting that refusal to answer was based on advice of counsel); *Jones*, 555 N.E.2d at 942 (same); *Banca*, 436 A.2d at 946 (same); *Gallagher*, 334 N.W.2d at 460 (same); *Matt*, 518 N.E.2d at 1173 (same); *Gardner*, 901 S.W.2d at 110 (noting that refusal to take polygraph was based on advice of counsel); *Gandy*, 607 P.2d at 583 (same).

IV. THE QUESTION PRESENTED IS AN IMPORTANT FIFTH AMENDMENT ISSUE THAT REQUIRES THIS COURT'S RESOLUTION

Review by the Court is also warranted because the question presented is an important and recurring Fifth Amendment issue, affecting public employees nationwide, as to which there should be a uniform constitutional rule. The lower courts are badly divided on the issue even after full percolation, however, and only review by this Court can resolve this severe and growing conflict.

Reflecting this continuing confusion in the lower courts, the California Supreme Court only recently granted review to address what (if any) conferral of immunity this Court's cases require before a public employee may be disciplined for invoking the privilege. *See Spielbauer v. County of Santa Clara*,, 146 Cal. App. 4th 914 (Cal. Ct. App. 2007), *vacated and review granted*, 159 P.3d 29 (Cal. 2007); *see generally* Comment, Matthew Bernt, *Should Public Employers Be Forced To Warn Their Employees Of Their Immunity And Duty To Answer Questions Before Demanding Answers And Taking Adverse Action?*, 56 CATH. U. L. REV. 1037 (2007).

It goes without saying, moreover, that the right at issue here—the Fifth Amendment privilege against self-incrimination—is of paramount importance, and, as Judge Stahl pointed out below, Pet. App. 44a, uncertainty as to the circumstances in which the privilege may be invoked is particularly harmful. Clarity on this issue is also important for public employers, which require clear guidance as to the

extent of their notice obligations and the circumstances in which employees may be disciplined for invoking the privilege.[9]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[9] Among other things, such employers are potentially subject to § 1983 claims by employees based on failure to satisfy these obligations. *See, e.g., Franklin*, 384 F.3d at 841.